



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Deere & Co.
File: B-224275
Date: October 31, 1986

DIGEST

1. Protest issue related to restrictions imposed on awards of contracts by the Department of Defense to Fiat S.p.A. and its subsidiaries because of 15-percent ownership of Fiat by the government of Libya is dismissed as moot where, subsequent to the filing of the protest, Libya has sold its entire interest in Fiat to Italian and other non-Libyan shareholders.

2. An offeror's ability to comply with a solicitation requirement that the offered model is the vendor's "latest model of its standard product," as it certified in its offer, is a matter to be considered as part of the determination as to whether the offeror is responsible.

3. An offeror's ultimate compliance with the Buy American Act certification made in its offer is a matter of contract administration which is the responsibility of the contracting agency, and not the General Accounting Office under its bid protest function.

DECISION

Deere & Co. protests the award of a contract to Fiatallis North America, Inc. (Fiatallis), a wholly-owned subsidiary of Fiat S.p.A. of Italy, under request for proposals (RFP) No. DLA700-86-R-7545, issued by the Defense Construction Supply Center, Defense Logistics Agency (DLA). The procurement is for the supply of 133 full-tracked tractor dozers. Deere complains that the award is improper because the contract is intended to be transferred through a novation to another entity that was not an offeror under the solicitation. Deere also contends that the tractor dozer offered by Fiatallis is not the firm's latest model, as required by the RFP, and will not be manufactured in Italy as certified but

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rather in countries whose end products are not exempt from the restrictions of the Buy American Act for evaluation purposes.

We dismiss the protest in part and deny it in part. By memorandum of May 21, 1986, the Deputy Secretary of Defense ordered that all contemplated awards to Fiat S.p.A. and its affiliates and subsidiaries were to be delayed. This action reflected continued concern over the fact that Fiat S.p.A. was 15-percent owned by the government of Libya, a country deemed to pose a threat to the security of the United States because of its support for acts of international terrorism. See J.I. Case Co., B-221588, et al., May 5, 1986, 86-1 CPD ¶ 430.

Subsequently, on August 12, the Department of Defense (DOD) entered into an agreement with Fiat S.p.A. whereby Fiat would establish a corporation within the United States, known as the Fiat Trading Company of North America, Inc. (Trading Company), which would be the only Fiat entity eligible to bid for and receive DOD contracts. The purpose for establishing the Trading Company was to prevent the profits on any DOD contract from being paid, either directly or indirectly, to the government of Libya. Accordingly, the Trading Company would pay no dividends to its shareholders during the period of the agreement and would set aside 17.8 percent of the price of any contract entered into in a special reserve account. Essentially, this agreement was to last as long as Libya retained any interest in Fiat.

At issue here, the agreement provided that, if any DOD contracts were awarded to Fiat entities other than the Trading Company after the August 12 date of the agreement, as a result of offers submitted prior to August 12, a novation agreement was to be effected recognizing the Trading Company as the Fiat contractor. The subject contract was awarded to Fiatallis on August 18, and Deere contends that the award is improper because it is intended to be transferred through a novation to another entity, the Trading Company, which was not an offeror under the solicitation.

We need not decide the matter because Libya has sold its entire interest in Fiat to Italian and other non-Libyan shareholders, therefore making any decision academic. See The Wall Street Journal, Sept. 24, 1986. Since the August 12 agreement between DOD and Fiat providing for novation agreements with the Trading Company was to last for only as long as Libya retained any interest in Fiat, it is obvious that the issue of an intended improper transfer of Fiatallis' contract under this solicitation to the Trading Company is

now moot. This Office will not consider issues of protest that have become moot because no useful purpose would be served even if we ultimately were to agree with the protester's position. See Riverport Industries, Inc., B-218056, Apr. 4, 1985, 85-1 CPD ¶ 390; D.C. Data Co., B-211246, May 19, 1983, 83-1 CPD ¶ 535. This issue is accordingly dismissed. 4 C.F.R. § 21.3(f) (1986).

Deere also contends that the dozer model offered by Fiatallis does not represent the "latest model of the standard product of the manufacturer," as required by the RFP. Deere asserts that the dozer model Fiatallis certified in the commercial item section of its offer it would furnish--the model 14C--has been superseded for Italian manufacture by model FD14, which Deere alleges is more sophisticated. Accordingly, Deere contends that Fiatallis' offer fails to meet a material requirement of the solicitation because the 14C does not represent Fiatallis' latest model of its standard commercial product, even if it is still made in Italy.

In this regard, however, Deere urges that the 14C, in fact, is no longer manufactured in Italy, which, as a NATO country, is exempt from the restrictions of the Buy American Act in supplying defense items to the government. See J.I. Case Co., B-221588, et al., supra, 86-1 CPD ¶ 430 at 6. Deere asserts that the 14C, rather than being manufactured in Italy, as certified by Fiatallis in its offer as the country of origin, will instead be manufactured in Brazil or Korea, countries whose end products are not exempt from the Buy American Act provisions for evaluation purposes. Hence, Deere argues that its offer will be lower than the Fiatallis offer, making it entitled to the award, if DLA applies the appropriate evaluation differentials to Fiatallis' offer. Id. at 7.

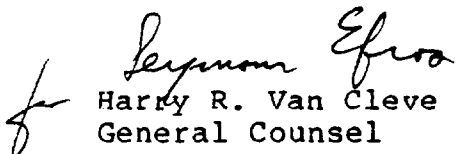
In rebuttal, Fiatallis contends that its model 14C, sold primarily to the North American market, is actually more sophisticated in terms of standard equipment and safety features than the model FD14, which is sold primarily to the European market and Third World countries. The firm also avers that the 14C continues to be made in Italy and has not been superseded by the FD14. In any event, Fiatallis joins with DLA in the view that the question of the firm's ultimate compliance with the conditions of the solicitation and the certifications made in its offer concerns matters of contract administration not for review by this Office.

A commercial item provision in the specifications, such as a requirement that the product be the manufacturer's "current" model, is like any other specification bearing on the product

to be furnished--the offeror must commit itself to meeting those requirements, but its ability to do so is encompassed by the contracting officer's subjective responsibility determination. Clausing Machine Tools, B-216113, May 13, 1985, 85-1 CPD ¶ 533. In its offer, Fiatallis certified that it would furnish its model 14C and that this model met the RFP requirement that its offered dozer be the "latest model of its standard product." Whether Fiatallis, by offering the model 14C, in fact could comply with the latest model requirement was a matter to be considered as part of the determination as to whether Fiatallis was responsible, a matter that we do not review in these circumstances. Caelter Industries, Inc., B-203418, Mar. 22, 1982, 82-1 CPD ¶ 265.

In a similar vein, this Office generally regards a bidder's actual compliance with Buy American Act certifications to be an issue of contract administration having no effect upon the validity of an award. See Autoclave Engineers, Inc., B-217212, Dec. 14, 1984, 84-2 CPD ¶ 668. By signing and submitting its offer, Fiatallis contractually obligated itself to furnish model 14C dozers manufactured in Italy, and, therefore, its ultimate compliance with that certification is a matter of contract administration not for our consideration. J.I. Case Co., B-221588, et al., supra, 86-1 CPD ¶ 430 at 7. However, unlike the situation in J.I. Case, where, significantly, the contract had yet to be awarded, we find no contradictory evidence from the record here sufficient for us to recommend to DLA that the agency verify Italy as the place of manufacture of the dozers. Id. at 8.

Accordingly, the protest is dismissed in part and denied in part.


Harry R. Van Cleve
General Counsel